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ABSTRACT

This digest of a full report with the same title reviews the literature on the legal implications of college faculty reappointment, promotion, and tenure decisions, with an emphasis on how an understanding of the relevant legal principles can inform practice. It briefly summarizes issues in the following areas: the role of the courts in reappointment, promotion, and tenure decisions; reasons for tenure being the subject of numerous faculty lawsuits; the contents of the faculty employment contract; the constitutional guarantees of due process for untenured faculty members; the courts' balancing of institutional and individual First Amendment rights; protection from illegal discrimination in reappointment, promotion, and tenure decisions; the legal boundaries of affirmative action; the courts' concern for balance between the importance of confidentiality for the peer review system and the need to prohibit discrimination; the liability exposure of administrators and faculty members participating in the peer review process. The digest also lists specific steps that can be taken by administrators, faculty members, and institutional attorneys to minimize the risk of litigation. (CK)

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Tenure, Promotion, and Reappointment: Legal and Administrative Implications

Benjamin Baez and John A. Centra

This report focuses on the legal implications of reappointment, promotion, and tenure decisions, with an emphasis on how an understanding of the relevant legal principles can inform practice. Through the use of scenarios and cases, we illustrate the conflict between institutional and individual rights, and the potential legal problems associated with employment contracts, due process requirements, academic freedom, employment discrimination, affirmative action, and peer review. Suggestions are offered for minimizing litigation and protecting institutional and individual rights. Some of the specific questions addressed in this report are:

What has been the role of courts in reappointment, promotion, or tenure decisions?
Institutions have a great deal of autonomy and discretion in making reappointment, promotion, or tenure decisions. Courts are reluctant to substitute their judgments for those of academic professionals. Recent legislation now permits the submission of employment discrimination cases to juries, perhaps making it likely that this reluctance may wane. At any rate, courts are required to intervene in these matters when the individual rights of faculty members are threatened. In cases involving discrimination and the First Amendment, courts seem to grant less deference to institutions than in other types of cases.

What is tenure, and why is it the subject of many faculty lawsuits?
Tenure was established to protect faculty members' academic freedom, and to provide enough financial security to attract able men and women to the profession. Courts have also established that tenure, once acquired, is a property interest protected by the Constitution when conferred by public institutions. Although cases by faculty members against colleges and universities involve reappointment, promotion, and other issues, the most prominent cases deal with the denial of tenure. While tenure has benefits for the institution and the faculty members, it also has financial consequences for the institution, especially during times of retrenchment. Faculty members denied tenure suffer financial, professional, and emotional consequences. As a result, lawsuits in this area are likely to increase.

What constitutes the faculty employment contract?
The faculty contract of employment refers not only to the letter of appointment but to other professional and institutional policies governing reappointment, promotion, and tenure decisions. Institutional policies are included in the faculty handbook, while AAUP policy statements, especially the 1940 Statement of Principles on Academic Freedom and Tenure, contain professional policies. Courts have also looked to institutional practices and customs, and the oral, written, and implied assurances of key administrators to determine the rights and responsibilities of the parties when the language of the contract is unclear, ambiguous, or inconsistent. Collective bargaining agreements are important types of contracts, and they may govern how faculty members are reappointed, promoted, or tenured. Federal labor law, which govern private collective bargaining, excludes faculty members who are considered "managers" and/or "supervisors," and thus the institution may refuse to bargain with their representatives. Faculty members are more likely to be considered "managers" or "supervisors" at large, private research institutions. Faculty members at public institutions may also be restricted in the collective bargaining ability under their states's labor laws'. Collective bargaining is an extremely complex and unsettled area of law, and institutions should seek expert legal and administrative assistance in dealing with such matters.

To what extent are untenured faculty members at public institutions entitled to due process under the United States Constitution?
The Constitution protects the property interests of faculty members at public institutions. Before such interests may be denied or withheld, public institutions must provide their faculty members with due process protection, including adequate notice and a hearing. Untenured faculty members at public institutions have due process rights for the duration of their contracts, but not after the contract expires—unless the contract of employment or state law provides them with a legitimate expectation of continued employment. Some faculty members may contend that they have acquired tenure informally. Courts are usually unwilling to find that faculty members have acquired tenure through informal means, especially if there are written and explicit policies governing how tenure is acquired. All faculty members at public institutions are entitled to due process protection when their liberty interests are arguably infringed. Liberty interests arise when institutions make charges or allegations against faculty members that may damage their reputations or impose a "stigma or other disability" preventing them from obtaining other employment. In negative reappointment, promotion, or tenure decisions, liberty interests are difficult to prove because the reasons for the denial are rarely made public, a required condition for prevailing in such a lawsuit.

How do courts balance institutional and individual academic freedom rights?
Institutions have the freedom to decide on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study. As a result, courts are reluctant to become involved in academic matters, such as pedagogy, grading, and course offerings, unless the institutions' decisions are intended to punish faculty members for their speech. Courts will become involved in negative employment decisions at public institutions that are motivated by the faculty members' exercise of their First Amendment or academic freedom rights. These rights include the freedom to comment on matters of public concern, the freedom to speak and express oneself, even if such speech is considered offensive, and the freedom to engage in certain activities, such as testifying in court cases or engaging in political or union activities.

How are faculty members protected from illegal discrimination in reappointment, promotion, or tenure decisions?
Although the United States Constitution and state laws prohibit discrimination, the bulk of the employment discrimination litigation have involved a number of federal civil rights laws, especially Title VII of the Civil Rights Act of 1964. Federal civil rights laws provide an easier burden of proof for faculty members alleging illegal discrimination than does the Constitution. These laws also provide better guidance to institutions for avoiding discrimination than many state laws. Given the inherent subjectivity of the promotion and tenure process, what is considered fair or meritorious is difficult to determine and will vary from person to person. Furthermore, some policies or practices adversely affect women and faculty of color. As a result, employment discrimination cases have been increasing, and colleges and universities should justify their reappointment, promotion, and tenure decisions with clear data and careful documentation.

What are the legal boundaries of affirmative action in faculty employment?
Affirmative action in the reappointment, promotion, and tenure process seeks to accomplish three objectives: eliminate the effects of an institution's own present or prior discrimination against women and persons of color; remedy societal discrimination and

increase the representation of women and persons of color in the faculty ranks; and promote racial and gender diversity on college campuses. But as the current societal and political debate makes clear, faculty members who do not benefit from affirmative action may feel that their individual rights have been violated, and that they have been the victims of "reverse discrimination." Institutions of higher education may feel that a balance between the goals of affirmative action and claims of reverse discrimination is impossible to attain. Nevertheless, institutions have been able to justify affirmative action if they are attempting to remedy the effects of their own discrimination. In addition, Title VII currently permits private and public institutions to implement voluntary affirmative action plans if there is a "manifest imbalance" in the job market, if the plans are only temporary, and if the interests of faculty members not benefitting from affirmative action are not unnecessarily "trammeled." Public institutions, however, are subject to much stronger standards of justification on constitutional grounds.

What rights do faculty members have to access confidential peer review materials?
Faculty members or the EEOC may be able to obtain access to peer review materials to discover proof of discrimination. Furthermore, in some states, peer evaluations are made generally available to faculty members under employee "right to know" or sunshine laws. Although faculty members alleging discrimination have been given access to their and others' personnel files, courts have been generally concerned with the impact this disclosure has on the peer review process. As a result, courts continue to search for a balance between the importance of confidentiality for the peer review system and the need to prohibit discrimination in higher education. The peer review system will likely not suffer from disclosure of confidential peer review materials. Peer evaluations based on sound and fair reasoning will always withstand challenges. Even though courts will compel disclosure in some situations, the decision of whether to voluntarily release peer review materials to the faculty member is one of institutional policy. Some institutions currently provide faculty members with, at a minimum, a redacted (i.e., with identifying information deleted) copy of the peer review materials, and recent data indicates that the peer review system is not greatly affected by disclosure of peer review materials.

To what extent are administrators and faculty members involved in the peer review process liable for defamation and other tort claims? Although faculty members and administrators involved in the peer review process can be sued for defamation and other torts, they are usually protected from liability by state law, or a qualified privilege (Qualified privileges against liability from defamation and other torts are granted to persons making employment evaluations, provided they acted without malice or ill will. The law grants these privileges when the interests at stake warrant them.). Also most institutions have insurance covering this type of matter. Peer reviewers can lose this protection if they act with malice, bad faith, or disclose the information to persons with no legitimate interest in the matter. So long as they acted honestly and fairly, and provided detailed examples for their conclusions, administrators and faculty members involved in the peer review process are generally protected from liability.

What can we do to minimize the risk of litigation?
Administrators, faculty members, and institutional attorneys should function as a team in informing other administrators and faculty members about the legal implications of their responsibilities. Legal audits should be performed periodically. These legal audits involve surveying each office and function to ensure that policies and practices are in compliance with legal principles. Furthermore, legal audits and teamwork can serve as an early warning system that alerts administrators, faculty members, and legal counsel of potential legal problems, long before they lead to litigation. Institutions should take steps to minimize the risks from litigation. We recommend the following:

- Institutions should involve legal counsel in determining policy and procedures for reappointment, promotion, and tenure decisions.
- The reappointment, promotion, and tenure policies should be explicit, unambiguous, and consistent, and these policies should clearly articulate how tenure is to be acquired.
- Institutions should eliminate or minimize those practices that are not specifically addressed in the institutions' written policies.
- Institutional officers and key administrators should be informed that their actions and words can bind the institutions to a contract.
- All units in the institution should be governed by a single reappointment, promotion, and tenure policy, though the standards may differ among units.
- The criteria for reappointment, promotion, or tenure should be specific enough to provide guidance to faculty members.
- Faculty members should be provided with as much information as possible as they prepare for their reappointment, promotion, or tenure review.
- Faculty members should be provided procedural safeguards before they are released from their contracts.
- Institutions should provide orientation and career development for new faculty members.
- Institutions should develop a process of annually evaluating faculty members.
- The faculty member should be apprised of any performance problem with enough time to improve.
- Faculty members should be provided with, at the very least, a redacted copy of their performance evaluations and peer review materials.
- Institutions should commit themselves to ending discrimination and to take whatever steps are necessary to achieve this end.
- Institutions should be conscious of the important legal, political, and social interests associated with affirmative action.
- Individuals involved in the evaluation or review process must be made aware of the fundamentals of employment discrimination law.
- Institutions should establish grievance procedures that are easy to use.
- Institutions should consider adopting binding arbitration or another method of alternative dispute resolution.

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by

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This report was prepared by the ERIC Clearinghouse on Higher Education in cooperation with the Association for the Study of Higher Education and published by the Graduate School of Education and Human Development at the George Washington University. Each report is a definitive review of the literature and institutional practice on a single critical issue. Many administrators subscribe to the series and circulate reports to staff and faculty committees with responsibility in a report's topic area.

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